No. 87-1100

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

JOHN J. LYNCH and JOSEPH S. WRIGHT, SR., individually and on behalf of those similarly situated,

Appellants,

v.

CITY OF CHICAGO, a Municipal Corporation; HAROLD WASHINGTON, Mayor of the City of Chicago, CECIL A. PARTEE, Treasurer of the City of Chicago, and WALTER K. KNORR, Comptroller of the City of Chicago,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

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July 1987

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QUESTIONS PRESENTED

This case involves an attempt by the City of Chicago to assess a fifty-percent tax upon the use of docking and mooring facilities located upon nagivable waters of the United States. The questions presented are as follows:

1. Whether the imposition of the Mooring Tax upon persons engaged in interstate commerce without providing any facilities or services imposes an impermissible burden on the free flow of interstate commerce under Article 1 §8 Clause 3 of the Constitution of the United States.

2. Whether the Mooring Tax is an unconstitutional tax upon the use of navigable waters of the United States in violation of Article 1 §8 Clause 3 of the Constitution of the United States.

3. Whether the Mooring Tax operates to impose a charge upon vessels for the privilege of entering and lying in a port and is thereby an unlawful duty of tonnage in violation of Article 1 §10 Clause 3 of the Constitution of the United States.

4. Whether the Mooring Tax unlawfully impedes the fundamental constitutional right of all citizens to travel freely from state to state.

PARTIES

The parties to this action are as follows:

John J. Lynch and Joseph S. Wright, Sr., individually and on behalf of those similarly situated;

The City of Chicago, a Municipal corporation;

Harold Washington, Mayor of the City of Chicago;

Cecil A. Partee, Treasurer of the City of Chicago; and

Walter K. Knorr, Comptroller of the City of Chicago.[1]

---

[1] Pursuant to an order entered by The Illinois Appellate Court, the case of *John J. Lynch, et. al. v. City of Chicago*, No. 84 1234 was consolidated on appeal with the following cases:

Roy L. Forsberg, John L. Reyertson, Gary V. Banser, Roy Laufter, Joseph Black, and *Russ Mills v. The City of Chicago, a municipal corporation and Charles Schneider, Director of Revenue for the City of Chicago,* No. 84 1223

Chicago Yachting Association v. City of Chicago; No. 84-1230

Chicagoland Boat Owners Association, et al. v. City of Chicago; No. 84-1349

These cases proceeded in the Appellate Court under the caption of *Roy L. Forsberg, et. al. v. City of Chicago* No. 84-1223. These parties do not join *John J. Lynch* and *Joseph S. Wright Sr.* in their appeal to this Court. A copy of the Order consolidating these cases is reprinted in the Appendix to this Appeal at A-1.

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No. 87-

In The
Supreme Court of the United States
October Term, 1987

JOHN J. LYNCH and JOSEPH S. WRIGHT, SR., individually and on behalf of those similarly situated,

Appellants,

v.

CITY OF CHICAGO, a Municipal Corporation; HAROLD WASHINGTON, Mayor of the City of Chicago, CECIL A. PARTEE, Treasurer of the City of Chicago, and WALTER K. KNORR, Comptroller of the City of Chicago,

Appellees.

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

The appellants, John J. Lynch and Joseph S. Wright, Sr., individually and on behalf of those similarly situated, appeal from the judgment of the Appellate Court of Illinois entered on November 26, 1986. The appellants respectfully submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction over this appeal and that substantial federal questions are presented.

PROCEEDINGS BELOW

The Judgment of the Appellate Court of Illinois, First Judicial District, was entered on November 26, 1986. A copy of the opinion of the Illinois Appellate Court is reported at 151 Ill. App. 3d 354, 104 Ill. Dec. 20, 502 N.E.2d 283 (1986), and is reprinted in the Appendix to this Appeal at A-6. A Petition for Leave to Appeal to the Supreme Court of Illinois was filed by Appellants on December 31, 1986. The Supreme Court of Illinois denied Appellants Petition for Leave to Appeal on April 15, 1987. A copy of the Order of the Supreme Court of Illinois denying Appellants' Petition for Leave to Appeal is reprinted in the Appendix to this Appeal at A-28.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2)(1986). Appellants have consistently maintained that the Mooring Tax as applied is invalid by reason of its repugnancy to the Constitution of the United States.

Initially, appeal from the decision of an intermediate Illinois Appellate Court to this Court is proper. For purposes of jurisdiction pursuant to 28 U.S.C. §1257(2), "the highest court of a State in which a decision could be had" may be an intermediate appellate court where a state court of last resort has declined to exercise its authority and accept an appeal. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 160 (1954). Thus, the denial by the Supreme Court of Illinois of Appellant's Petition for Leave to Appeal requires that this Court review the judgment of the Appellate Court of Illinois as the "highest court of a State in which a decision could be had." 28 U.S.C. §1257(2) (1986).

Moreover, Section 1257(2) requires that the validity of a "statute of any state" be drawn into question. The reference in 28 U.S.C. §1257(2) (1986) to a "statute of any

state" has been defined to include every legislative action to which a state gives the force of law, *Williams v. Bruffy*, 96 U.S. 176, 183 (1877), including municipal ordinances. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n. 3 (1975).

The judgment of the Appellate Court of Illinois was entered on November 26, 1986. A Notice of Appeal to this Court was filed on July 13, 1987, in the Appellate Court of Illinois, First Judicial District. A copy of the Appellant's Notice of Appeal is reprinted in the Appendix to this Appeal at A-29.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

This case involves the extent to which a municipality may use its power of taxation to restrict the free flow of interstate commerce. Specifically, the Mooring Tax is an attempt to impose a tax upon persons entering and lying in the harbors of the City of Chicago without the City providing any corresponding services or facilities whatsoever. Thus, this Appeal involves two separate provisions of the Constitution of the United States:

> 1. Article I §8 Clause 3: The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;
>
> * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> 2. Article I §10 Clause 3: No State shall, without the Consent of Congress, lay any Duty of Tonnage . . .

The full text of Article I §8 Clause 3 and Article I §10 Clause 3 of the Constitution of the United States is set forth in the Appendix to this Appeal at A-33.

The Mooring Tax Ordinance provides in pertinent part:

> "200.8-2.A. A tax is hereby imposed upon any watercraft moored or docked for a fee in any harbor, river or other body of water within the corporate limits or jurisdiction of the City of Chicago, at a rate of 50% of such mooring or docking fee.
>
> * * *
>
> 200.8-6.B. The tax imposed herein shall not apply to any watercraft, its owner, operator or person in possession to the extent the imposition of this tax upon such would violate the Constitution of the United States or the State of Illinois.
>
> * * *
>
> 200.8-1.A. Mooring or docking fee: The term mooring or docking fee' or any similar term shall mean the consideration paid for the mooring or docking or the right to the mooring or docking of any watercraft, valued in money, whether received in money or otherwise, determined without any deductions whatsoever, but not including any consideration paid for the mooring or docking of a watercraft in the loading or unloading of goods or materials, or the boarding or unboarding of passengers, in the conduct of a business."

The full text of the Mooring Tax Ordinance is set forth in the Appendix to this Appeal at A-36.

STATEMENT OF THE CASE

On December 27, 1983, the City Council of the City of Chicago passed the Chicago Boat Mooring Ordinance (hereinafter "the Mooring Tax"). (Ch. 200.8 of the Municipal Code of Chicago). The ordinance imposes a tax on watercraft moored or docked for a fee in any harbor, river or other body of water within the corporate limits or jurisdiction of the City of Chicago. The tax is imposed at a rate of fifty-percent of such mooring or docking fees.

Watercraft owned by government bodies are exempt from the tax, as are persons and watercraft upon which the

imposition of the tax would violate either the United States or Illinois Constitutions. (Appx. at 39). Furthermore, mooring or docking fees paid in the loading or unloading of goods or materials, or the boarding or unboarding of passengers in the conduct of a business are not part of the "mooring or docking fees" used to determine the tax due. (Appx. at A-37). Watercraft subject to this tax presumably include: charter fishing boats, tugs, dredging barges, commercial fishing vessels, vessels used for sailing instructional classes and, in general, the entire class of recreational vessels.

On January 17, 1984, plaintiffs, on behalf of a class including both commercial and pleasure vessels, filed this cause of action against the City of Chicago. Plaintiffs' Complaint asserts that the mooring tax is void because it constitutes an *ultra vires* attempt to impose a municipal tax upon the use of navigable waters of the United States of America. Plaintiffs further complain that the mooring tax is a burden on interstate commerce and an unlawful duty of tonnage in violation of Article 1 Section 8 clause 3 and Article 1 Section 10 clause 3 of the United States Constitution. (Appx. at A-33).

The trial court, however, concluded that the mooring tax was not a burden on interstate commerce, was not an ultra vires tax, or an unlawful duty of tonnage. (Appx. at A-3). On May 18, 1984, the Circuit Court entered an order dismissing all complaints challenging the constitutionality of the Chicago Boat Mooring Tax Ordinance. (Appx. at A-3).

On appeal the plaintiffs argued that: (1) the mooring tax was an unconstitutional tax on the use of navigable waters of the United States; (2) that the mooring tax was unconstitutional as an impermissible burden on the free flow of interstate commerce because the City of Chicago provided no facilities or service; (3) that the mooring tax imposed an unlawful duty of tonnage under Article 1 §10

clause 3 of the United States Constitution; (4) that the mooring tax unlawfully impeded the right of all citizens to travel freely from state to state; (5) that the City of Chicago failed in its attempt to save the mooring tax from constitutional attack; and (6) that the statutory scheme in Illinois demonstrated a legislative attempt to grant the exclusive jurisdiction and control of the Chicago harbors to the Chicago Park District.

The Appellate Court held that the mooring tax was not an unconstitutional tax on the use of navigable waters of the United States because the charge was placed upon a commercial transaction within the City, not upon the navigation of waters. (Appx. at A-17). The Appellate Court stated that the mooring tax did not restrict movement upon navigable waters. (Appx. at A-17).

The Appellate Court also concluded that the mooring tax did not impede interstate commerce. (Appx. at A-18). Instead, the Court held the tax was imposed only upon boat owners who use certain physical facilities located within the City of Chicago. The court held that the exemptions included within the ordinance were sufficient to avoid an impermissible burden on interstate commerce. (Appx. at A-18).

Regarding plaintiffs' argument that special benefits must be conferred by the City of Chicago on the persons burdened by the mooring tax, the Illinois Appellate Court ruled that "... the general revenue mooring tax need not be supported by specific benefits." (Appx. at A-19).

The Illinois Appellate Court also concluded that the mooring tax did not unlawfully impede a citizens' right to travel freely from state to state. (Appx. at A-20). Although the Illinois Appellate Court recognized the right of a citizen to travel, it noted that no penalty was here imposed on persons who exercised the right to travel to Chicago or who had arrived in a Chicago harbor. (Appx. at A-19).

Finally, the Illinois Appellate Court addressed plaintiffs' argument that the mooring tax imposed an unlawful duty of tonnage under Article 1, Section 10, Clause §3 of the United States Constitution by concluding that the argument was raised for the first time on appeal and was therefore waived. (Appx. at A-20). The Court also noted that the tonnage clause was intended to protect the freedom of commerce after a vessel had arrived in port. (Appx. at A-20).

SUBSTANTIALITY OF QUESTIONS TO BE REVIEWED

This Appeal presents three separate United States Constitutional questions which warrant this Court's review. First, this Appeal involves the extent to which a municipality may constitutionally restrict access to its ports and harbors and thereby burden the free flow of interstate commerce and the use of navigable waters of the United States. Second, this Appeal involves the extent to which a municipality can use its power of taxation to impose a charge upon vessels for the privilege of entering and lying in a port. Third, this Appeal involves the extent to which a municipality may restrict an individual's fundamental constitutional right to travel freely from state to state.

All three theories share one common theme: In order for a state or municipality to impose a fee for the use of an instrumentality of commerce or travel, that fee must be predicated upon the reasonable charge for the use of facilities or services being provided by the state or municipality. However, contrary to the mandate of this Court, the Appellate Court below stated, " . . . the general revenue mooring tax need not be supported by specific benefits." (Appx. at A-19). The Appellate Court is in error.

I. The Imposition of the Mooring Tax Without Providing Any Services or Facilities Imposes an Impermissible Burden on Interstate Commerce and the Use of Navigable Waters.

A. The Mooring Tax Impermissibly Burdens Interstate Commerce.

Article I §8, Clause 3 of the United States Constitution grants Congress control over interstate commerce and also confers upon the federal government the supreme authority over navigable waters for the purposes of regulating navigation and all that pertains thereto. This authority may not be interfered with by the laws of the states. *Cornell Steamboat Co. v. Sohmer*, 235 U.S. 549, 559 (1915).

This Court has, on many occasions, addressed a municipality's attempt to assess a license fee or tax upon the use of navigable waterways and their related facilities. This Court has repeatedly held that in order for a state or municipality to charge a fee for the use of docking or wharfing facilities, this fee must be supported as compensation for specific benefits conferred by the state or municipality. *Harmon* v. *City of Chicago*, 147 U.S. 396 (1893); *Huse* v. *Glover*, 119 U.S. 543 (1886).

For example, in *Huse* v. *Glover*, 119 U.S. 543 (1886), the legislature of the State of Illinois had adopted special measures for improving the navigation of the Illinois River, including the construction of a lock and dam in two places on the river. A toll was charged for the use of the locks. Huse maintained that the fee, required to be paid prior to the use of the locks, was an unlawful restraint of trade and prohibitive of interstate commerce in violation of the United States Constitution. This Court, however, ruled that the exaction of tolls for the passage through the locks was compensation for the use of these artificially created facilities and was therefore not an undue burden to interstate commerce or an impost upon the navigation of the river. 119 U.S. at 548.

Similarly, in *Harmon* v. *City of Chicago*, 147 U.S. 396 (1893), the City of Chicago had enacted an ordinance which required steam tugs traveling upon the Chicago River and its branches to obtain a license and pay a fee. The City argued that it had, on occasion, deepened the river by dredging. The licensing ordinance, however, did not recite that the fee was exacted in order to reimburse the City for these maintenance activities. This Court held that the proposed licensing fee was invalid because the City of Chicago imposed the fee upon vessels without providing any perceptible benefits. 147 U.S. at 411.

In the present case, the City of Chicago does not provide, or even claim to provide, any facilities, services, or benefits of any kind in return for the exaction of a fee for the use of docking or mooring facilities. These facilities and services are currently provided by the Chicago Park District, private enterprises, and private yacht clubs. The provision of such services or facilities is required in order to avoid an impermissible burden on interstate commerce.

In ignoring the requirements of *Harmon* and *Huse*, the Appellate Court of Illinois relied upon the decision of a Maryland Appellate Court in *Reinhardt* v. *Anne Arundel County*, 31 Md. App. 355, 356 A.2d 917 (1976). (Appx. at A-17). While the Appellate Court chose to rely upon the decision of the Maryland Appellate Court in *Reinhardt*, it did not address or mention the contrary decisions of the United States Supreme Court in either *Harmon* or *Huse*. Consequently, review of the decision below is required to reverse the determination of the Appellate Court.

B. The Mooring Tax Impermissibly Burdens the Use of Navigable Waters of the United States.

The Appellate Court held that restricting access to mooring and docking facilities which adjoin a navigable water way, by use of a Mooring Tax, does not restrict the use of such waterway nor impede the flow of interstate

commerce. (Appx. at A-17). Instead, the Court found that the tax is merely a charge levied upon a commercial transactions within the City of Chicago. (Appx. at A-17).

In order to use navigable waters, one must also be able to use the adjoining mooring and docking facilities. If every municipality were permitted to charge mooring and docking fees without providing a benefit, the protection afforded the flow of interstate commerce and the use of navigable waters would be rendered meaningless. Thus, the Appellate Court was in error in holding that restricting access to mooring and docking facilities by way of a mooring tax does not restrict the use of navigable waters nor impede the flow of interstate commerce.

II. The Mooring Tax Imposes a Charge Upon Vessels for the Privilege of Entering and Lying in a Port in Violation of Article 1 Section 10 Clause 3 of the Constitution of the United States.

Article I, §10 Clause 3 of the Constitution of the United States reads in pertinent part, "no state shall, without the consent of Congress, lay any duty of tonnage . . . " This prohibition has been defined so as, " . . . to embrace all taxes and duties regardless of their name or form and even though not measured by the tonnage of the vesssel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port, . . . " *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935).

In *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), the defendant, the State Docks Commission, was authorized to operate all harbors and ports within Alabama. The State Docks Commission was, accordingly, authorized to impose charges for all services and facilities provided. Clyde Mallory Lines contested the collection of "harbor fees" by the State Docks Commission for mooring and shifting vessels in the harbor. This Court, in upholding the harbor fee, concluded that it was a reasonable charge

for the services provided. 296 U.S. at 264. In the present case, unlike *Clyde Mallory Lines*, the City of Chicago provides no services or facilities in return for the imposition of the Mooring Tax.

The Appellate Court concluded that the tonnage clause was only meant to protect the freedom of commerce and, therefore, did not apply to the parties subject to the Mooring Tax. (Appx. at A-20). This response further illustrates the Appellate Court's erroneous view of the Mooring Tax and its affect upon interstate commerce. Given the expansive power of Congress to regulate commerce, *Wickard* v. *Filburn*, 317 U.S. 111 (1942), the Mooring Tax directly impacts upon the myriad of Chicago lakefront enterprises which are dependent upon free access to the harbors of Chicago. The Appellate Court was in error in concluding that the Mooring Tax does not affect the free flow of interstate commerce and thereby violate Article I, §10 Clause 3 of the Constitution of the United States.

III. The Mooring Tax Unlawfully Impedes the Fundamental Constitutional Right of All Citizens to Travel Freely From State to State.

The constitutional right to travel was first discussed by this Court in *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35 (1868). Usually, the right to travel has been founded on the commerce clause. *Helson* v. *Kentucky*, 279 U.S. 245, 251 (1929). Although the right to travel is not specifically mentioned in the Constitution, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. *U.S.* v. *Guest*, 383 U.S. 745, 758 (1966).

The standard used to determine when a state may restrict a citizen's right to travel is indistinguishable from the analysis used in cases involving navigable waters. That is, the right to travel may be restricted, and a reasonable fee imposed, where a state or municipality provides a facility or service which aids the right to travel and, the

charge must reflect a fair approximation of the value of the use of such facilities or services. *Evansville-Vanderburgh Airport Auth.Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 712-13 (1972).

For example, in *Evansville*, the Airport imposed a "use or service charge of One Dollar ($1.00) for each passenger emplaning any commercial aircraft . . . " The money collected was held by the Airport Authority to defray costs for construction, maintenance, and improvement of the airport. This Court held that the service charge was not a burden on interstate commece in that it merely remitted to the Airport Authority funds used in construction and maintenance. 405 U.S. at 714. The Court stated:

> [W]here a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the State itself; and so long as they are reasonable and are fixed according to some uniform, fair and practical standard they constitute no burden on interstate commerce. (Citing *Transportation Co.* v. *Parkersburg*, 107 U.S. 691, 699; *Huse* v. *Glover*, 119 U.S. 543, 549.)

In the instant case, the City seeks to impose a charge upon facilities already owned, operated and maintained by other parties. The mooring tax directly impacts persons traveling by watercraft either to or from Chicago or, persons desiring to stay in a Chicago harbor. Thus, these fees would clearly restrict anyone desiring to exercise their right to travel freely from state to state.

The court below stated:

> No penalty imposed upon persons who recently exercised their right to travel and have arrived in a Chicago harbor. [Citation omitted] Instead, this ordinance applies to all persons paying a mooring or docking fee, whether they have recently arrived, have been here for a lengthy period of

> time, or have never left the Chicago harbors. [Citation omitted] The fact that it effects boats which are mobile vehicles, does not alter this finding. (Appx. at A-19).

The fact that the Mooring Tax effects travelers and local residents alike does not save the tax from impermissibly restricting a citizen's right to travel. Regardless, the Mooring Tax remains an impermissible burden on a citizen's right to travel.

CONCLUSION

For the foregoing reasons, plaintiff's appeal should be granted.

Respectfully submitted,

JOHN J. LYNCH
& JOSEPH S.
WRIGHT SR. by

One of Their Attorneys

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APPENDIX

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IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

ROY L. FORSBERT, JOHN L. REYNERTSON, GARY V. BANSER, ROY LAUFTER, JOSEPH BLACK and RUSS MILLS,

Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO; a Muncipal Corporation, and CHARLES SCHNEIDER Director of Revenue for the City of Chicago,

Defendants-Appellees.

No. 84-1223

ORDER

On motion of the City of Chicago, defendants-appellees, by JAMES D. MONTGOMERY, Corporation Counsel of the City of Chicago, their Attorney, to consolidate all Chicago Boat Mooring Tax cases for oral argument, due notice having been served, for good cause shown and the Court being fully advised:

IT IS ORDERED that the following cases are consolidated: 84-1223; 84-1234; 84-1230; and 84-1349. IT IS FURTHER ORDERED that the consolidated cases shall proceed under No. 84-1223 and shall be captioned as the caption in No. 84-1223.

ORDER ENTERED
Mar 05 1986

Name

Attorney For

Address

City

Telephone

DOM J. RIZZI
Justice

Justice

Justice

GILBERT S. MARCHMAN,
CLERK OF THE APPELLATE COURT,
FIRST DISTRICT

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION**

JOHN J. LYNCH and JOSEPH S. WRIGHT, SR., individually and on behalf of those similarly situated,

Plaintiffs,

vs.

CITY OF CHICAGO, et al.

Defendants.

No. 84 L 50140

FINAL ORDER

THIS CAUSE COMING on to be heard on the Defendants's Motion to Strike and Dismiss the Plaintiff's Complaint, all parties having appeared by their respective counsel, the Court having considered the pleadings, oral arguments of counsel for the parties and memorandum submitted by said counsel, and being fully advised in the premises;

THIS COURT FINDS THAT:

1. This is not a tax beyond the territory or jurisdiction of the City of Chicago.
2. It is not a tax on the Chicago Park District or its property.
3. It is not a license fee on the Chicago Park District.
4. It does not violate any portion of the Illinois Constitution as to the authority of the City to tax or as a power not given to a home rule unit.
5. It is not licensing for revenue.

6. It is not a burden on interstate commerce.

7. The definitions of the boundaries of the City of Chicago and its jurisdiction are adequately met by this ordinance, coupled with existing statutes and court cases.

8. The tax is not ultra-vires of the City. It is within the power of the City.

9. The tax is not a violation of the United States Constitution as to laying a duty on tonnage or on imports or exports.

10. Any other ground alleged in the complaint not covered above is found to be, by this Court, without merit.

THEREFORE, IT IS HEREBY ORDERED:

1. For the reasons stated in the above findings, the Defendant' Motion to Strike and Dismiss the Plaintiff's Complaint under ¶2-615 of the Illinois Code of Civil Procedure is granted.

2. The Plaintiff's Complaint is dismissed with prejudice.

3. Leave to file an amended complaint is hereby denied.

4. Plaintiff's pending motion for class certification is hereby denied.

5. All parties are barred from further discovery.

6. For the year 1984, the tax due under the Chicago Mooring Tax Ordinance (hereinafter called "Ordinance") enacted December 27, 1983 shall be due June 1, 1984 for any mooring or docking fee paid before February 1, 1984. For any mooring or docking fee paid on or after February 1, 1984, the tax shall be due June 1, 1984 or 30 days after the mooring or docking fee is paid, whichever date is later.

Any penalties, civil or criminal, provided under the Ordinance, for non-payment or compliance with the above, shall be effective after June 1, 1984.

Beginning January 1, 1985, all provisions of the Ordinance shall be in effect as passed by the Chicago City Council, along with amendments, if any, thereto.

7. The Director of Revenue of the City of Chicago and all officials of the City of Chicago are permanently enjoined from changing in any way any portion of the Chicago Boat Mooring Tax Ordinance, except through appropriate action by the City Council and the approval or veto of the Mayor of the City of Chicago.

8. The Director of Revenue shall file with this Court by May 22, 1984, his personal receipt for and acknowledgement of this order. The Court retains jurisdiction of this case for the purpose of enforcing this paragraph.

9. The injunction against the City collecting the tax or receiving the tax is lifted immediately and is no longer in effect. A Chicago Boat Mooring Tax Escrow Account for segregating tax funds received under the Ordinance is established under a separate order of this Court entered on May 16, 1984.

10. No just reasons exist to delay enforcement of this order or to appeal.

DATED this 18th day of May, 1984.

Enter: Judge Paul F. Elward
May 18, 1984
Circuit Court 376

JUDGE PAUL F. ELWARD

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Third Division
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Nos. 84 - 1223, 84 - 1230,

Nos. 84 - 1234, 84 - 1349

ROY L. ROESBERG, JOHN L. REYNERTSON, GARY V. BANSER, ROY LAUFTER, JOSEPH BLACK and RUSS MILLS, et at.,
Plaintiffs-Appellants,

v.

THE CITY OF CHICAGO, a Municipal Corporation, et. al.,
Defendants-Appellees.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HONORABLE
PAUL F. ELWARD
PRESIDING

JUSTICE McNAMARA delivered the opinion of the court: Plaintiffs filed four separate actions against defendants city of Chicago and its various officers challenging the constitutionality of the Chicago boat mooring tax. Plaintiffs appeal from trial court orders dismissing their actions on various grounds. The four actions were consolidated on appeal. The mooring tax was enacted by the Chicago city council December 27, 1983, and was to be effective January 1, 1984. It reads, in relevant part:

> "200.8-2.A. A tax is hereby imposed upon any watercraft moored or docked for a fee in any harbor, river or other body of water within the corporate limits or jurisdiction of the City of Chicago, at a rate of 50% of such mooring or docking fee. . . . The tax herein shall be due by March 1 of each calendar year for mooring or docking fees paid by February 1 of such year for the right to moor or dock said water craft in said year. For any mooring or docking fee paid after February 1 of any year for the right to moor or dock said watercraft in said year, the tax herein shall be due within 30 days of the payment of said fee.
>
> * * *

200.8-6.B. The tax imposed herein shall not apply to any watercraft, its owner, operator or person in possession to the extent the imposition of this tax upon such would violate the Constitution of the United States or the State of Illinois.

200.8-6. Whenever it appears to any person that he should not be required to pay any tax imposed herein he may file a protest along with his payment and request a hearing. A hearing shall, thereafter, be provided by the Director * * *.

* * *

200.8-8. Any person found guilty of violating, disobeying, neglecting or refusing to comply with any of the provisions of this Chapter, except as otherwise provided, upon conviction shall be punished by a fine of not less than $ 50.00 nor more than $100.00 for each offense in any 180-day period, provided, that all actions seeking the imposition of fines only shall be filed as quasi-criminal actions subject to the provisions of the Illinois Code of Civil Procedure

* * *

Repeated offenses in excess of three within any 180-day period may also be punishable as a misdemeanor by incarceration in the County Jail for a term not to exceed six months under the procedures set forth in section 1-21.1 of the Illinois Municipal Code *** and under provisions of the Illinois Code of Criminal procedure * * * in a separate proceeding." (Municipal Code od the City of Chicago, ch. 200.8 (1984).)

In *Forsberg v. City of Chicago*, on January 12, 1984, plaintiffs Roy L. Forsberg, John L. Reynertson, Gary V. Banser, Roy Laufter, Joseph Black and Russ Mills filed a class action on behalf of the named plaintiffs, and all persons paying the mooring or docking fee upon which the tax is based against defendants, the City of Chicago and Charles Sneider, the director of revenue for the city.

Plaintiffs sought as declaratory judgment that the tax was unconstitutional and invalid, and sought injunctive and other relief. On February 10, 1984, the trial court entered agreed orders certifying the class; approving lead counsel; preliminarily enjoining the city from imposing penalties for non-payment of the tax; and establishing a mooring tax escrow account. On February 15, 1984, those orders were vacated. On February 21, 1984, a mooring tax escrow account was established. On February 22, 1984, the city was enjoined from collecting the tax. On May 16, 1984, the trial court ordered that a new mooring tax escrow account be established.

After hearings on defendants' motion to dismiss, the trial court made specific findings. The trial court found that the mooring tax was not beyond the territory or jurisdiction of the city; that the tax was not a tax on the Chicago Park District or its property; that the tax is not a license fee on the Chicago Park District; and that the tax does not violate any portion of the Illinois Constitution as to the authority of the city to tax or as a power not given to a home rule unit. The trial court found further that the tax is not a tax on an occupation; that the tax is not a discriminatory tax as to a group to which it applies, and meets the test of uniformity; that the tax is not licensing for revenue; and that the tax is not a special tax on one group for the benefit of others any more than any other valid city tax which falls on some citizens and not others. The trial court also found that the taxpayers are not under this ordinance deprived of property without due process, and a specific provision in the ordinance relates to protests and hearings; that the tax is not indefinite or ambiguous; that the tax is not a tax on the use of navigable waters or on interstate commerce; and that while a large portion of the base of the tax apparently does not benefit boat owners, this does not invalidate the tax because the remedy for boat owners is to attack the Chicago Park District mooring fees in another action. The trial court also found that the

definitions of the boundaries of the city and its jurisdiction are adequately met by the ordinance, coupled with existing statutes and cases; that the tax is not *ultra-vires* of the city and is within the power of the city; and that any other ground of the complaint was without merit.

The trial court granted defendants' motion to strike and dismiss the complaint with prejudice in *Forsberg* pursuant to section 2-615 of the Code of Civil Procedure. (Ill. Rev. Stat. 1983, ch. 110, par. 2-615.) In addition, plaintiffs' oral motion for leave to file an amended complaint and pending motion for class certification were denied, and all pending and further discovery was barred. The trial court ordered that for the year 1984, the tax would be due on June 1, 1984 for any mooring or docking fee paid before February 1, 1984. For any mooring or docking fee paid on or after February 1, 1984, the tax would be due June 1, 1984, or 30 days after the mooring or docking fee was paid, whichever date was later. Penalties under the ordinance would be effective after June 1, 1984. Beginning January 1, 1985, all provisions of the ordinance would be in effect as passed by the Chicago city council. The city was permanently enjoined from changing in any way any portion of the tax ordinance, except through appropriate action by the city council. The injunction against the city from collecting the tax was lifted. Finally, the court noted that a mooring tax escrow account for segregating tax funds received under the ordinance was established under a separate order dated May 16, 1984. On May 31, 1984, this court stayed the enforcement and collection of the tax, pending this appeal. On appeal, plaintiffs in *Forsberg* contend that the trial court erred in dismissing the complaint; erred in denying plaintiffs' motion to amend the complaint; and erred in denying plaintiffs' motion for class certification.

In *Lynch v. City of Chicago*, on January 17, 1984, plaintiffs John J. Lynch and Joseph S. Wright, Sr., filed a class action on behalf of commercial and pleasure vessel

boat owners. On May 18, 1984, the trial court dismissed the complaint in *Lynch*. On appeal, the plaintiffs in *Lynch* contend that the mooring tax is unconstitutional for several reasons.

In *Chicagoland Boat Owner Association v. City of Chicago*, on February 10, 1984, the Chicagoland Boat Owners Association (CBOA) and four individually named plaintiffs, Leon M. Delano, Jr., Kipp M. Webb, John D. Hirn, and Melvin Bechina, filed suit against defendants, the city of Chicago, and its Director of Revenue, its Treasurer, its controller and its mayor, seeking declaratory and injunctive relief.

On May 18, 1984, the trial court granted defendants' motion to strike and dismiss plaintiffs' amended complaint. The court found that pursuant to section 2-615(a)(3) of the Code of Civil Procedure, the class action and individual plaintiffs' actions were barred by prior pending actions. On appeal, plaintiffs in *CBOA* contend that the trial court erred in finding it had no standing to challenge the mooring tax; and that the trial court erred in finding that plaintiffs' actions were barred by prior pending actions.

In *Chicago Yachting Association v. City of Chicago*, on January 20, 1984, the Chicago Yachting Association (CYA) filed suit against defendants, the city of Chicago, its Director of Revenue, and the Chicago Park District, seeking declaratory and injunctive relief. (Subsequently, the Chicago Park District was allowed to become realigned as a party plaintiff. It filed its own suit against the city of Chicago, alleging that the tax is an unconstitutional interference with its grant of authority to provide recreational harbors at a reasonable fee. Its request for preliminary relief was denied, and that judgment was affirmed by this court and by our supreme court. *Chicago Park District v. City of Chicago* (1984), 127 Ill. App. 3d 215, 468 N.E. 2d 1261, *aff'd.* (1986), 111 Ill. 2d 7, 488 N.E. 2d 968.

On May 18, 1984, the trial court granted defendants'

motion to strike and dismiss the CYA's complaint. The court found that the CYA had no standing to challenge the mooring tax; and that pursuant to section 2-615(a)(3) of the Code of Civil Procedure the action was barred by prior pending actions. The CYA's petition for leave to amend its complaint was denied. On appeal, the CYA contends that the trial court erred in finding it had no standing to challenge the mooring tax; and that the CYA's action is not barred by prior pending actions.

We first address the issues raised in *Forsberg*, some of which are also raised in *Lynch*. Plaintiffs in *Forsberg* argue that the city of Chicago has no jurisdiction over the property or activities of the Chicago Park District. In *Chicago Park District v. City of Chicago* (1986). 111 Ill. 2d 7, 488 N.E. 3d 968, our supreme court held that the city has the authority under the Constitution to impose the mooring tax.

Plaintiffs in *Forsberg* contend next that the tax is an attempt by the city to levy an extraterritorial tax because it is assessed against boat owners or users who are not necessarily residents of Chicago. A home rule unit may exercise any power and perform any function pertaining to its government and affairs, including the power to tax. (Ill. Const. 1970, Art. VII, sec. 6(a).) The power to tax is broad and an exercise of that power is valid unless the power is restricted by a constitutional provision or appropriate legislation. (*Mulligan v. Dunne* (1975), 61 Ill. 2d 544, 338 N.E. 2d 6, *cert. denied* 425 U.S. 916.) Moreover, powers and functions of home rule units shall be construed liberally. (Ill. Const. 1970, Art, VII, sec. 6(m).) A local unit of government is not exercising its taxing powers extraterritorially when it collects a tax from persons located outside the boundaries of the local unit, but who do business within those boundaries. (*Mulligan v. Dunne.*) Moreover, it cannot be said that non-residents of a home rule unit could never be subjected to taxes by that unit. Services rendered

within the city may be taxed. (See *Commercial Ntl. Bank v. City of Chicago* (1981), 89 Ill. 2d 45, 432 N.E. 2d 227.) In the present case, the city has authority to enact an ordinance imposing a boat mooring tax within the city limits. (*Chicago Park District v. City of Chicago.*) The tax is not extraterritorial where it is imposed on persons who may reside outside of Chicago, but who enter Chicago harbors, use Chicago facilities and pay mooring or docking fees in Chicago.

Plaintiffs maintain that the taxing activities of the Park District do not pertain to the government and affairs of Chicago and that the tax violates the taxing powers of the city and exceeds the authority of a home rule municipality. Plaintiffs in *Lynch* also contend that the tax exceeds the City's home rule authority. We find those arguments unpersuasive in view of our supreme court's holding in *Chicago Park District*, that the city, a home rule unit, has the authority to impose the mooring tax.

Plaintiffs in *Forsberg* contend further that the tax ordinance discriminates against individuals who pay a mooring fee within the calendar year, which is an arbitrary classification which voids the entire tax. This argument is being raised for the first time on appeal and therefore is waived. *City of Urbana v. Burgess* (1976), 40 Ill. App. 3d 244, 351 N.E. 2d 607.

Plaintiffs in *Forsberg* contend that the tax is imposed on the affairs of the Park District. Plaintiffs point out that the relevant statute states that the harbor is owned and operated by the Park District and is exempt from taxation. (Ill. Rev. Stat. 1983, ch. 105, par. 333 23n, 333.23p.) The tax ordinance, however, is not on the harbor or the Park District. Instead, the tax is on its patrons. Plaintiffs maintain that the real effect of the tax is to tax the Park District. As the supreme court stated in *Chicago Park District*, the city is simply taxing an event which occurs within it boundaries and in an area for which it provides services.

In further support of their argument, plaintiffs state that *Board of Education v. City of Peoria* (1979), 76 Ill. 2d 469, 394 N.E. 2d 399, should have no bearing on the validity of the mooring tax. "The most that can be said for the holding in *Peoria* is that it stands for the proposition that incidental impositions of burdens upon local park districts can be countenanced." Plaintiffs argue that a 50% tax cannot be considered incidental. In *Chicago Park District*, however, the supreme court relied on *City of Peoria* and found that the reference to "incidental burdens" in that case was not to the amount of the tax, but rather to the question of tax collection.

Plaintiffs in *Forsberg* next contend that the tax ordinance is indefinite and ambiguous because "jurisdiction" is too broad of a term; and "moored" and "docked" are too vague. Plaintiffs also maintain that the same defect is found in the requirement that the tax be based on the "consideration paid for the mooring or docking * * * valued in money, whether received in money or otherwise * * * " Plaintiffs argue that it is not clear how the non-monetary consideration for the docking is to be considered.

The rules of construction which apply to statutes also apply to ordinances. (*Kostecki by Kostecki v. Pavlis* (1986), 140 Ill. App. 3d 176, 488 N.E. 2d 644.) Each term used in an ordinance need not be specifically defined, nor can the exact application of the ordinance to every factual situation be delineated. (*O'Connor v. A&P Enterprises* 1980, 81 Ill. 2d 260, 408 N.E. 2d 204.) A word or phrase not defined in an ordinance will be given its ordinary meaning. (*City of Chicago v. Penn R.R.Co.* (1968), 41 Ill. 2d 245, 242, N.E. 2d 152.) All reasonable doubts regarding the construction of an ordinance must be resolved in favor to its constitutionality. *People v. A&P Enterprises.*

The individual terms complained of here are commonly used in other Illinois statutes without definition. (See, *e.g.*, Ill. Rev. Stat. 1983, ch. 95-1/2, par. 31-3 (Boat Registration

and Safety Act); ch. 105, par. 333.23 (Park District's power as to harbors); ch. 24, par. 7-4-1 (power to enact health and quarantine ordinances). "Mooring" means securing one's boat. The term "jursidiction" is specifically referred to in the ordinance with regard to harbors, rivers or other bodies of water within Chicago. We cannot say these terms are so indefinite as to violate constitutional principles. Finally, the valuation of non-monetary consideration must be determined on a case-by-case basis. Such terminology is used without definition in many Illinois statutes. (See, *e.g.*, Ill. Rev. Stat. 1983 ch. 120, par. 439.2 (use tax); ch. 120, par. 439.32 (service use tax) ch. 120, par. 439.102 (service occupation tax); ch. 120, par. 440 (retailers' occupation tax).) Thus, upon examination of the ordinance, we find that there is no basis to anticipate undue difficulty in applying its provisions. Where ordinances contain general language, the variety of interpretations suggested is limited only by the ingenuity of counsel who attack the language. Should a situation present itself where deprivation of due process results, the matter can be adjudicated at that time. See *Paper Supply Co. v. City of Chicago* (1974), 57 Ill. 2d 553, 317 N.E. 2d 3.

Plaintiffs in *Forsberg* next contend that the size of the tax and the "draconian" civil and criminal penalties imposed violate due process requirements. Plaintiffs rely on article VII, section 6(e) of the Illinois Constitution which states that "A home rule unit shall have only the power that the General Assembly may provide by law * * * to punish by imprisonment for more than 6 months * * *." (Ill. Cont. 1970, art. VII, sec. 6(e).) Plaintiffs maintain that the penalties are disproportionate to the offense of not paying the tax. Section 20.8-8 of the ordinance provides for notification of each offense. Section 20.8-6 provides for a taxpayer's filing of a protest and provides for a hearing. That section also provides that all actions seeking the imposition of fines will be quasi-criminal actions. Section 200.8-6 also states that any jail term cannot exceed six months. The

legislature's power to impose penalties to aid administration and insure collection of taxes has long been uniformly recognized. (*Dept. of Revenue v. Shore Line Petroleum Co.* (1955), 7 Ill. 2d 186, 130 N.E. 2d 203.) Furthermore, the nature, character and extent of penalties are wholly legislative, notwithstanding a court's finding that the penalties are absurd. (*People v. Landers* (1927), 329 Ill. 453, 160 N.E. 836.) The penalties are void only if they are so disproportionate to the offense as to shock the conscience of reasonable persons. (*People v. Landers.*) We cannot say that the penalties here are so disproportionate to the offense as to shock the conscience of reasonable persons. Similar penalties are contained in other municipal tax ordinances. (See, *e.g.*, ch. 200.3, sec. 3-11 of Chicago Municipal Code (Chicago Employers' Expense tax); ch. 156.1 sec. 1-10 (Chicago Parking Lot and Garage Tax); ch. 200.6, sec. 6-21 (Chicago Sales Tax).) In addition, the penalties here are limited to six months imprisonment, as mandated in the Illinois constitution.

Plaintiffs in *Forsberg* next contend that the tax is discriminatory, unreasonable and non-uniformly imposed. Plaintiffs argue that only boat users who moor or dock their boats for a fee are taxed; that those who own their own moorings escape taxation; that those who do not moor or dock their boats but use other maritime facilities such as land storage are not taxed; that non-residents are charged 25% more than residents; that many boat owners receive no services or benefits from the city; and that those paying fees to entities other than the Park District will probably be taxed at a different rate.

In taxation, legislatures possess the greatest freedom in classification. (*Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, *reh. denied* 411 U.S. 910.) The legislature has very broad powers, therefore, to establish classifications defining objects of taxation. (*Williams v. City of Chicago* (1970), 66 Ill. 2d 423, 362 N.E. 2d 1030, *cert.*

denied 434 U.S. 924.) The classification is constitutional if it is reasonable. (*Williams v. City of Chicago.*) There is a presumption that the classification is valid, and the burden of establishing the unreasonableness of the tax classification rests on plaintiffs. (*Jacobs v. City of Chicago* (1973), 53 Ill. 2d 421, 292 N.E. 2d 401.) Plaintiffs must negate every conceivable basis which might support the tax classification. (*Lehnhausen v. Lake Shore Auto Parts Co.: Williams v. City of Chicago.*) The presumption of constitutionality can be overcome only by the most explicit demonstration that the classification is a hostile and oppressive discrimination against particular persons and classes. (*Lehnhausen v. Lake Shore Auto Parts Co.*) The reasons justifying the classification need not appear on the face of the statute. *Williams v. City of Chicago.*

In the present case, the city counsel was permitted to define a sub-class without imposing a tax on the general class of all boat owners. (See *Fiorito v. Jones* (1968), 39 Ill. 2d 531, 236 N.E. 2d 698.) The classification distinguishes between persons entering into a commercial transaction in which consideration is exchanged for mooring and persons not entering into such a transaction because they own mooring facilities or receive the facilities as a gift. Persons who, *e.g.*, store boats on shore are involved in a different type of activity. (See *Titus v. The Texas Company* (1973), 55 Ill. 2d 437, 33 N.E.2d 361.) Absolute precision is not required in establishing classifications. (*Titus v. The Texas Company.*) Moreover, it may be administratively more convenient to tax those who pay a Park District fee because the Park District maintains records and thus the usual difficulty in monitoring the collection of taxes from these mobile boats is eliminated. This, and other administrative advantages, may be a proper basis for the classifications here. See *Williams V. City of Chicago.*

As discussed below, we will not address the 25% surcharge here. In regard to the argument that boat owners

receive no services from the city, we note that not all persons burdened by a tax must be benefited in the same way. (See *Kocsis v. Chicago Park District* (1935), 362 Ill. 24, 198 N.E. 847.) Plaintiffs' argument that others might be taxed at a different rate is conclusory and this court will not render an advisory opinion on this hypothetical set of facts.

Plaintiffs in *Forsberg* next contend that the mooring tax is a prohibited license for revenue. Article VII, section 6(e) of the Illinois Constitution provides that a home rule unit shall only have the power that the General Assembly may provide by law to license for revenue. Plaintiffs argue that the size of the tax alone proves that the purpose of the tax is to raise revenue. In *Chicago Park District*, the court held that the size of the tax is a matter to be determined by the legislature, not the courts. The court refused to find that the 50% tax was an unreasonable burden, holding instead that it was for the General Assembly to consider possible abuses of home rule power. Furthermore, a license for revenue is an attempt by a governmental unit, which does not have the power to tax, to use its police power to raise revenue. (*Paper Supply Co. v. City of Chicago.*) In *Chicago Park District*, the supreme court held that the city of Chicago has the home rule authority to impose this mooring tax. Thus, the tax is imposed pursuant to the city's valid taxing power and is not an attempt to use its police power to raise revenue.

Plaintiffs in *Forsberg* and *Lynch* contend that the mooring tax is a tax on navigable waters and a burden on interstate commerce. Congress' control over interstate commerce includes supreme authority over navigable waters. (*Cornell Steamboat Co. v. Sohmer* (1915), 235 U.S. 549.) The charge here, however, is on a commercial transaction within the city, not upon the navigation of waters. (See *Cornell Steamboat Co. v. Sohmer.*) The mooring tax does not restrict movement upon navigable waters. (See *Reinhardt v. Anne Arundel County* (1976), 31 Md. App.

355, 356 A.2ds 917.) Neither does it impede interstate commerce. Instead, the tax is imposed only upon boat owners who use certain physical facilities within the city of Chicago. In addition to upholding the tax in *Chicago Park District*, our supreme court held in an earlier case that the Park District harbor fee is not an unconstitutional exercise of municipal authority over navigable waters, nor does it interfere with interstate commerce. *MacNeil v. Chicago Park District* (1948), 401 Ill. 556, 82 N.E.2d 452.

Additionally, the ordinance at issue here contains express exemptions such that it does not include "any consideration paid for the mooring or docking of a watercraft in the loading or unloading of goods or materials, or the boarding or unboarding of passengers, in the conduct of a business." (Municipal Code of the City of Chicago, sec. 200.8-1A (1984).) The ordinance also states that the tax shall not apply to the extent that it would violate the Constitution of the United States or the State of Illinois. (Municipal Code of the City of Chicago, sec. 200.8-1.A (1984).) Such an express exemption in an ordinance is sufficient to avoid an impermissible burden on interstate commerce. (See *Cornell Steamboat Co. v. Sohmer.*) Furthermore, a tax on an event occurring within the taxing body is not a prohibited tax on interstate commerce. (*Sundstrand Corp. v. Department of Revenue* (1975), 34 Ill. App. 3d 694, 339 N.E. 2d 351.) A tax is valid upon things which are at rest within the taxing body, notwithstanding the fact that they might have been involved in interstate transit before or after that time. (*American Airlines, Inc. v. Department of Revenue* (1974), 58 Ill. 2d 251, 319 N.E. 2d 28; *Sundstrand Corp. v. Department of Revenue.*) The moors or docks to which the boats are tied remain stationary within the Chicago harbors, and thus the tax is not upon goods which are in the stream of interstate commerce.

Plaintiffs also argue that special benefits must be conferred by the city on the persons burdened by the moor-

ing tax. In addition, plaintiffs contend that the tax violates the public policy of the state of Illinois that parks are not to be operated preferentially to benefit any one group. Plaintiffs maintain that the tax benefits only the citizens of Chicago so that their property taxes do not need to be increased. States are vested with great latitude in imposing general revenue taxes. (*Commonwealth Edison Co. v. Montana* (1981), 453 U.S. 609 *reh. denied* 453 U.S. 927.) In return for general revenue taxes, taxpayers are constitutionally entitled only to the enjoyment they derive from the privilege of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. A tax is not an assessment of benefits, but instead is a means of distributing the burden of the cost of government. This principle has not been divested by the commerce clause merely because the taxed activity has some connection to interstate commerce, especially when the tax is levied on an activity conducted within the State. (*Commonwealth Edison Co. v. Montana.*) Here, the general revenue mooring tax need not be supported by specific benefits.

Plaintiffs in Lynch contend that the mooring tax unlawfully impedes their rights as private citizens to travel. The right to travel is a fundamental constitutional right and citizens may not be punished for exercising that right. (*Shapiro v. Thompson* (1969), 394 U.S. 618.) Here, no penalty is imposed on persons who recently exercised their right to travel and have arrived in a Chicago harbor. (*Compare Dunn v. Blumstein* (1972), 405 U.S. 330; *Shapiro v. Thompson* (durational residence requirements).) Instead, this ordinance applies to all persons paying a mooring or docking fee, whether they have recently arrived, have been here for a lengthy period of time, or have never left the Chicago harbors. (See, *e.g., Dunn*, 405 U.S. at 342, n. 12; *Shapiro*, 394 U.S. at 638, n. 21.) The mooring tax is not aimed at transients. (See, *e.g, Village of BelleTerre v. Boraas* (1974, 416 U.S. 1.) The fact that it affects boats, which are mobile vehicles, does not alter this

finding. The purpose of the tax is not to keep people away from Chicago harbors. (See *CEEED v. Calif. Coastal Zone Conservating Com.* (1974), 43 Cal. App.3d 306, 118 Cal. Rptr. 315.) Furthermore, a tax imposed for the purpose of raising revenue may be characterized as an enforced contribution, but it is not a penalty imposed on the taxpayer. (See *Welch v. Henry* 1938), 305 U.S. 134, *reh. denied* 305 U.S. 675; see generally 84 C.J.S., Taxation §1, n.20 at 33 (1954).) We conclude, therefore that the boat mooring tax does not impose a penalty on persons who have exercised their right to travel.

Plaintiffs in *Forsberg* and *Lynch* contend that the mooring tax violates the constitutional prohibition against laying duties of tonnage because the tax is not structured as compensating for specific benefits conferred. This argument is raised for the first time on appeal and thus has been waived (*City of Urbana v. Burgess.*) Furthermore, the tonnage clause is meant to protect the freedom of commerce. The mooring tax is a tax upon something which occurs after the boat has entered the port. (See *In re Los Angeles Lumber Products Co.* (S.D. Cal. 1942), 45 F. Supp. 77; *Reinhardt v. Anne Arundel County.*) The mooring tax is imposed only upon those who pay a fee for the docking or mooring facilities.

The *Forsberg* plaintiffs next contend that the mooring tax is an impermissible tax on occupations because it taxes boat owners who are engaged in occupations such as chartering, commercial fishing, and sightseeing tours. Article VII, section 6 of the Illinois Constitution provides that a home rule unit shall have only the power that the General Assembly may provide by law to license for revenue or impose taxes upon or measured by income or earnings or upon occupations. (Ill. Const. 1970, Art. VII, sec. 6(a).) An occupation tax either regulates or controls a given business or occupation, or imposes a tax for the privilege of exercising, undertaking or operating a given occupation, trade or

profession. It licenses a person engaged in a given occupation. (*Paper Supply Co. v. City of Chicago.*) An excise tax such as the one at issue here is not transformed into a occupation tax because some of the boat owners subject to the tax happen to use the boats in occupations or businesses. (See *Town of Cicero v. Fox Valley Trotting Club* (1976), 65 Ill. 2d 10, 357 N.E. 2d 1118.) While the tax here burdens some persons who moor their boats in connection with their business, it also burdens recreational and other non-profit boat users. The tax is not confined to those who are engaged in business for profit, and is not a tax imposed on a given occupation. (See *Town of Cicero v. Fox Valley Trotting Club.*) Plaintiffs' arguments that the mooring tax is a tax upon the Park District's service of leasing moors and docks is not before this court because the Park District is not a party to this action, as we discuss below. Moreover, while the Park District provides services, it is not required to pay or collect the tax. (See *Commercial Ntl. Bank v. City of Chicago.*) The tax, therefore, is not a tax upon occupations.

Plaintiffs in *Forsberg* also contend that the mooring tax has been and will be administered unfairly. Plaintiffs cite the fact that on February 27, 1984 the Acting Director of Revenue unilaterally extended the date for paying the tax, which "by itself, proves the arbitrary manner in which the tax is administered." We fail to see how this extension was uniform in effect and plaintiffs have failed to establish intentional or purposeful discrimination. (See *Kerasotes Rialto Theater Corp. v. City of Peoria-* (1979), 77 Ill. 2d 491, 397 N.E. 2d 790.) Plaintiffs also point to the form used by the city, which fails to tax or take into account persons who store their watercraft, use the launch facilities, or use the mooring and docks on a temporary or irregular basis. Plaintiffs voluntarily withdrew this argument before the trial court, and we will not address it here.

Plaintiffs in *Forsberg* next contend that the tax is

invalid because the Park District fees upon which it is based are excessive and arbitrarily set for several reasons. The Park District is not a party to this action, and thus plaintiffs cannot litigate this issue here. An entity having a material interest in the subject matter of the litigation is a necessary party. (*Consolidated Cable Utilities & Supply Co.,Inc. v. City of Aurora* (1982), 108 Ill. App. 3d 1035, 439 N.E. 2d 1272.) On review, this court may not disregard this rule of joinder. (See *National Bank of Albany Park in Chicago v. S.N.H.,Inc.* (1975), 32 Ill. App. 3d 110, 336 N.E. 2d 115.) The Park District would be materially affected by a finding that its fees are excessive and arbitrary. Moreover, the additional 25% charged to non-residents is being considered in a separate action before this court. (*Broeckl v. Chicago Park District* Nos. 85-2995, 85-3062, 1st Dist., 3d Div.). For these reasons, we will not address the propriety of the Park District fees further.

Plaintiffs in *Forsberg* contend further that the taxes paid to the city are a gift unless held in a segregated account. We find that an escrow fund is not necessary. If the need should ever arise, a taxpayer may recover excess taxes under section 6 of the Boat Mooring Tax Ordinance. Municipal Code of the City of Chicago, ch. 200.8, sec. 6 (1984).

Finally, plaintiffs in *Forsberg* contend that the trial court erred in denying plaintiffs' motion to certify the class. A class cannot be certified where no cause of action exists. (*Spring Mill Townhomes v. OSLA Financial Services,Inc.* (1984), 124 Ill. App. 3d 774; 465 N.E. 2d 490.) The trial court's denial of the motion to certify the class was proper.

We find, therefore, that the trial court's dismissal of the complaints in *Forsberg* and *Lynch* was proper because plaintiffs in those actions failed to state a cause of action.

We turn now to the issues raised by the Chicagoland Boat Owners Association (CBOA) and the Chicago Yachting Association (CYA). Both CBOA and CYA first contend

that they have standing to sue. The CBOA is a voluntary association consisting of approximately 2,400 individual boat owners who use the rivers and lakefront of Chicago for recreational purposes. The four individually named plaintiffs each own boats which are sometimes moored in Chicago. All four plaintiffs have paid mooring fees to the Chicago Park District and thus would be affected by the mooring tax, which is based on such fees. The CYA is a not-for-profit corporation and a voluntary association of Chicago area yacht clubs, which have several thousand individual members. Several of the yacht clubs own and maintain moorings.

One requirement in order to establish standing to bring an action for declaratory relief is that an association suing on behalf of its members must be "interested in the controversy."(Ill. Rev. Stat. 1983, ch. 110, par. 2-701(a).) "Interested" requires more than merely having a curiosity about or concern for the outcome of the controversy. (*Underground Contractors Ass'n. v. City of Chicago* (1977), 66 Ill. 2d 371, 362 N.E. 2d 298; *Spring Mill Townhomes Ass'n. v. OSLA Financial Services.*) The party seeking relief must have a personal claim, stake, status or right which is capable of being protected. (*Underground Contractors Ass'n. v. City of Chicago; Spring Mill Townhomes Ass'. n. OSLA Financial Services.*) An injury is direct when it touches the legal relations of parties who stand in a position adverse to one another. (*Underground Contractors; Spring Mill Townhomes Ass'n.*) The association must allege and prove that it suffered an injury in its individual capacity to a substantive, legally protected interest. (*Spring Mill Townhomes Ass'n; Austin View Civic Ass'n v. City of Palos Heights* (1980), 85 Ill. App. 3d 89, 405 N.E. 2d 1256.) The CBOA and the CYA are not subject to the tax. Neither association owns moorings or pays mooring fees in Chicago. They have shown no direct injury suffered as a result of the mooring tax.

In *Chicago Park District*, the supreme court found that the Park District had standing on the basis of its allegations that the mooring tax interfered with the Park District's bond contracts and regulation functions, and diminished revenues derived from fees. Thus the Park District was able to show a direct injury. The CYA's reliance on *Illinois Gamefowl Breeders Ass'n.* is misplaced. The CYA states that the court in that case "held that ownership of gamefowl by some of the association's members" was determinative of the standing issue. That court, however, held that the association itself owned gamefowl, not that the association's members owned gamefowl. In contrast, the associations here do not pay mooring fees. Only the members of the associations pay mooring fees.

The associations argue that they meet the federal standing requirements. (See *Warth v. Seldin* (1975), 422 U.S 490.) Under that standard, an association has standing to bring suit in its representative capacity in certain situations, notwithstanding the fact that the association suffered no direct injury. While our supreme court discussed the federal standard in Underground Contractors Ass'n v. Chicago, the court has continued to use the direct injury requirement. (See *Illinois Gamefowl Breeders v. Block.*) We find no indication that Illinois courts have adopted the federal standard. Illinois decisions discussing an association's standing to maintain an action for declaratory relief on behalf of its members clearly hold that an association's representational capacity alone is not enough to give it standing, absent a showing that it has a recognizable interest in the dispute, peculiar to itself and capable of being affected. See, *e.g.*, *Underground Contractors ass'n.* (no standing where association is not engaged in construction business, and does not compete for public works contracts); *Austin View Civic Ass'n. v. City of Palos* (no standing where association itself does not purchase water from defendant); *Spring Mill TownhomesAss'n. v. OSLA Financial Services* (no standing where association

has never been a townhome unit owner, does not hold title to townhome roofs or have authority to maintain roofs for damages beyond ordinary wear). An additional requirement for standing is that there be an "actual controversy." (Ill. Rev. Stat. 1983, ch. 110, par. 2-701(a).) This requires a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy of some part thereof. (*Underground Contractors Ass'n.; Berg v. City of Chicago* (1968), 97 Ill. App. 2d 410, 240 N.E. 2d 344.) The CBOA and the CYA present allegations that their memberships wil drop and the existence of the associations will be threatened. These are merely conclusory allegations. (*See Underground Contractors Ass'n.*) Their complaints fail to allege facts showing injury or threat of injury sufficient to allow them to maintain these actions. The trial court, therefore, properly found that the CBOA and the CYA had no standing to challenge the boat mooring taxes on behalf of their members. In addition, our holding herein that the tax is constitutional would render the associations' challenges moot even if we found the motions to dismiss were improperly granted, and thus no actual case or controversy exists. See *Underground Contractors Ass'n.*

The CYA and the CBOA contend further that the trial court erred in finding their actions were barred by two prior pending actions. Although we have found that these associations have no standing, *CBOA* includes four individual plaintiffs, and thus we also address this issue. Section 2-619(a)(3) of the Code of Civil Procedure states that an action may be dismissed on the ground that there is another action pending between the same parties for the same cause. (Ill. Rev. Stat. 1983, ch. 110, par. 2-619(a)(3).) The purpose of this section is to further the interest of judicial economy and avoid a multiplicity of actions, and it should be construed liberally. (*Catalano v. Aetna Casualty & Surety co.* (1982), 105 Ill. App. 3d 194, 434 N.E. 2d 31.) Neither the parties nor the cause need be identical to the

prior pending suit. *People ex rel. Phillips Petroleum Co. v. Gitchoff* (1976), 65 Ill. 2d 249, 357 N.E. 2d 534; *Catalano v. Aetna Casualty & Surety Co.*

The *Forsberg* plaintiffs and the *Lynch* plaintiffs both included persons who have paid or will pay mooring or docking fees to the Chicago Park District. The *CYA* and *CBOA* plaintiffs include the two associations, and four individual members of the CBOA. Those individual members and the members whom the associations represent are subject to the mooring fees and therefore are included as members of the classes in *Forsberg* and *Lynch*. Thus, the parties are substantially the same in these actions. The fact that no class was ever certified does not alter this holding because a class cannot be certified unless the named plaintiffs have stated a cause of action. *Spring Mill Townhomes Ass'n.*

The class plaintiffs in *CBOA* state that they were the first to define the class properly, and the class plaintiff in *CYA* argues that it was the only plaintiff to bring the Park District into the litigation. Those points are irrelevant in view of our holding that the associations had no standing to sue. Furthermore, that one action is filed prior to another is not determinative under section 2-619(a)(3). *A.E. Staley Mfg.Co. v. Swift & Co.* (1980), 84 Ill. 2d 245, 419 N.E. 2d 23. A showing of substantial similarity of issues is sufficient to establish that the suits present the "same cause" under section 2-619(a)(3). (*Catalano v. Aetna Casualty & Surety Co.*) Both cases must request relief which is predicated on substantially the same set of facts. (*Skolnick v. Martin* (1964), 32 Ill. 2d 55, 203 N.E. 2d 429, *cert. denied* (1965), 381 U.S. 926). The four consolidated cases here are all predicated on substantially the same set of facts involving persons who pay mooring or docking fees in Chicago. These actions all challenge the constitutionality of the tax based on those fees. All plaintiffs seek to have the mooring tax declared void and enjoin the city of Chicago from

its enforcement. While some of the legal theories raised in the four actions differ, the causes need not be identical. (*Catalano v. Aetna Casualty & Surety Co.*) Plaintiffs in *CBOA* argue that they alleged a different factual situation because even if the tax is not unconstitutional on its face, it could be unconstitutional as applied to certain individual cases. We note that CBOA's complaint only challenges the tax on its face.

In sum, we hold that the trial court properly dismissed the *CBOA* and *CYA* complaints with prejudice under section 2-619(a)(3) because the actions were barred by the pending *Forsberg* and *Lynch* suits. We agree with the trial court's finding that the tax is constitutional, and the trial court properly dismissed the *Forsberg* and *Lynch* complaints for failure to state a cause of action and properly denied all requests to amend plaintiffs' complaint. For the foregoing reasons, the judgments of the circuit court of Cook County are affirmed. Judgments affirmed.

McGILLICUDDY and WHITE, JJ., concur.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
(217) 782-2035

April 15, 1987

Mr. Joseph S. Wright, Jr.
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No. 64620–Roy L. Forsberg, et al. (John J. Lynch, et al., etc., petitioners, v. The City of Chicago, etc., et al., respondents). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on May 7, 1987.

IN THE
ILLINOIS APPELLATE COURT, FIRST DISTRICT

JOHN J. LYNCH and JOSEPH S. WRIGHT, SR. individually and on behalf of those similarly situated

Plaintiffs/Appellants,

vs.

THE CITY OF CHICAGO, a municipal corporation; HAROLD WASHINGTON, Mayor of the City of Chicago; CECIL PARTEE, Treasurer of the City of Chicago; and WALTER K. KNORR, Comptroller of the City of Chicago,

Defendants/Appellees.

Appeal From The Appellate Court of Illinois First Judicial District,

No. 84-1234

Heard on Appeal From The Circuit Court of Cook County, Illinois, No. 84 L 50140

The Honorable Paul F. Elward, Presiding

NOTICE OF APPEAL

The appellants, John J. Lynch and and Joseph S. Wright, Sr., individually and on behalf of those similarly situated, appeal the judgment of the Appellate Court of Illinois, First Judicial District, dated November 26, 1986, which upheld the validity of the Chicago Boat Mooring Tax, (Chicago Municipal Code, §§200.8-2(a) through 200.8-8). On April 15, 1987 the Illinois Supreme Court denied plaintiffs' leave to appeal.

Jurisdiction in the United States Supreme Court is invoked pursuant to 28 U.S.C. §1257(2) (1986). Although the instant case was consolidated on appeal to the Illinois Appellate Court with the case of *Roy L. Forsberg, et al. v.*

City of Chicago, et al., No. 84 1223, the Forsberg plaintiffs are not parties to the instant appeal.

Respectfully submitted,

JOHN J. LYNCH and
JOSEPH S. WRIGHT, SR.

By: _____
One of Their Attorneys

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AFFIDAVIT OF SERVICE

I, NICHOLAS J. NEDEAU, an attorney and member of the Illinois Supreme Court Bar, depose and state under oath that I have served a copy of the foregoing Notice of Appeal upon those parties whose names and addresses appear on the attached service list. These include all the parties who are required to be served. I have served a copy of the foregoing Notice of Appeal upon each party on the service list by placing a copy of same in the United States mail chute at 55 West Monroe Street, Chicago, Illinois before the hour of 5:00 p.m., with proper postage prepaid, on the 13th day of July, 1987.

NICHOLAS J. NEDEAU
One of the Attorneys for
JOHN J. LYNCH and
JOSEPH S. WRIGHT, SR.

SUBSCRIBED AND SWORN TO
before me this _____
day of July, 1987.

Notary Public

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CONSTITUTION OF THE UNITED STATES
Article I

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as many, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;-And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such

Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

CHAPTER 200.8*
CHICAGO BOAT MOORING TAX

200.8. Title
200.8-1. Definitions
200.8-2. Tax imposed
200.8-3. Decal to be affixed; liability for payment; recovery of tax or penalty
200.8-4. Application for transfer
200.8-5. Deposit of revenues
200.8-6. Exceptions; rules and regulations
200.8-6. Procedure for protesting tax
200.8-7. Unlawful to mutilate decal
200.8-8. Penalty

Title

200.8. This Chapter shall be known and cited as the "Chicago Boat Mooring Tax Ordinance" and the tax herein imposed shall be known and cited as the "Chicago Boat Mooring Tax."

Definitions

200.8-1. A. For the purposes of this Chapter, when any of the following words or terms are used herein they shall have the meaning or construction ascribed to them in this section:

City: The term "City" shall mean the City of Chicago, Illinois.

Director of Revenue: The term "Director of Revenue" or "Director" shall mean the City of Chicago, Illinois.

Department: The term "Department" or "Department of Revenue" shall mean the Department of Revenue of the City of Chicago.

Watercraft: The term "watercraft" shall mean any boat, vessel or other craft used or capable of being used as a means of transportation on water.

* Passed. Coun. J. 12-27-83, p. 4306.

48 1-1-84 (Enacted)

Mooring or docking fee: The term "mooring or docking fee" or any similar term shall mean the consideration paid for the mooring or docking or the right to the mooring or docking of any watercraft, valued in money, whether received in money or otherwise, determined without any deductions whatsoever, but not including any consideration paid for the mooring or docking of a watercraft in the loading or unloading of goods or materials, or the boarding or unboarding of passengers, in the conduct of a business.

Person: The term "Person" shall mean any natural individual, firm, trust, estate, partnership, association, joint stock company, joint venture, corporation, receiver, trustee, conservator or other representative appointed by any court.

B. In this Chapter, unless the context otherwise requires words in the singular number include the plural, and in the plural include the singular; words of the masculine gender include the feminine and the neuter; and when the sense so indicates, words of the neuter gender may refer to any gender.

Tax imposed

200.8-2. A. A tax is hereby imposed upon any water craft moored or docked for a fee in any harbor, river or other body of water within the corporate limits or jurisdiction of the City of Chicago, on or after January 1, 1984, at a rate of 50% of such mooring or docking fee. The person paying this mooring or docking fee shall be liable for the payment of this tax. Such person shall pay said tax by paying it directly to the Department. The tax herein shall be due by March 1 of each calendar year for mooring or docking fees paid by February 1 of such year for the right to moor or dock said watercraft in said year. For any mooring or docking fee paid after February 1 of any year for the right to moor or dock said watercraft in said year,

the tax herein shall be due within 30 days of the payment of said fee. A receipt or decal reflecting the tax payment shall be issued by the Department. If a decal is issued it shall be attached in plain view on the outside of the watercraft or on its windshield. If a receipt is issued it shall be kept on the watercraft and be available for inspection at any reasonable time. The owner of any watercraft subject to the tax imposed herein shall be liable for said tax, if he allows such watercraft to be moored or docked within the corporate limits or jurisdiction of the City without payment of this tax.

B. The tax imposed by this Chapter shall be increased by 25%, if not paid by the date it is due.

200.8-3. A. Any tax paid herein shall be for a particular watercraft and any decal or receipt issued shall only be attached to or held on the watercraft it applies to.

B. Any person allowed by the owner or other authorized person to operate or be in possession of a watercraft subject to this tax, who is in possession of said watercraft while moored or docked within the corporate limits or jurisdiction of the City, shall be liable for the payment of the tax imposed herein if such tax was not previously paid for such watercraft, and failure to pay such tax shall be a violation of this Chapter.

C. The Corporation Counsel shall bring any action on behalf of the Department, in any court of competent jurisdiction for the recovery of any tax or penalty, or for the imposition of any fine or jail sentence, as provided under the provisions of this Chapter.

Application for transfer

200.8-4. Whenever any watercraft, for which a tax was paid under this Chapter, is sold or otherwise disposed of, and thereafter another watercraft is acquired, and the person who paid the tax desires to transfer the tax receipt or

decal originally issued for the old watercraft, to said new watercraft, such person shall immediately make an application for such transfer with the Department. Said application shall be supplied by the Department and should be filled out by such person and submitted with an unmutilated original decal or receipt, and the payment of a transfer fee of $5.00 shall accompany any such application.

Deposit of revenues

200.8-5. All revenues from this Chapter shall be paid into, the treasury of the City of Chicago and shall be credited to and deposited in the corporate fund of the City.

Exceptions; rules and regulations

200.8-6. A. The tax imposed herein shall not apply to watercraft owned by governmental bodies.

B. The tax imposed herein shall not apply to any watercraft, its owner, operator or person in possession to the extent the imposition of this tax upon such would violate the Constitution of the United States or the State of Illinois.

C. The Director of Revenue is hereby empowered to promulgate, adopt and enforce rules and regulations relating to any matter pertaining to the administration and enforcement of the provisions of this Chapter.

Procedure for protesting tax

200.8-6. Whenever it appears to any person that he should not be required to pay any tax imposed herein he may file a protest along with his payment and request a hearing. A hearing shall, thereafter, be provided by the Director, or his designee, at the Department's office, and afterwards a determination on such protest shall be made by the Director.

Unlawful to mutilate decal

200.8-7. It shall be unlawful for any person to destroy, remove or mutilate any decal or receipt issued pursuant to this Chapter, without the consent of the owner of the watercraft it pertains to.

Penalty

200.8-8. Any person found guilty of violating, disobeying, neglecting or refusing to comply with any of the provisions of this Chapter, except as otherwise provided, upon conviction shall be punished by a fine of not less than $50.00 nor more than $100.00 for each offense in any 180-day period, provided, that all actions seeking the imposition of fines only shall be filed as quasi-criminal actions subject to the provisions of the Illinois Code of Civil Procedure (Ill. Rev. Stat. 1981, ch. 110, par. 1-101, et seq.). Repeated offenses in excess of three within any 180-day period may also be punishable as a misdemeanor by incarceration in the County Jail for a term not to exceed six months under the procedures set forth in Section 1-2-1.1 of the Illinois Municipal Code (Ill. Rev. Stat. 1981, ch. 24, par. 1-2-1.1) and under provisions of the Illinois Code of Criminal Procedure (Ill. Rev. Stat. 1981, ch. 38, pars. 100-1, et seq.) in a separate proceeding. A separate and distinct offense shall be regarded as committed each day upon which said person shall continue any such violation, or permit any such violation to exist after notification thereof.

SECTION 2. If any provision of this Chapter or application thereof to any person or circumstance is held unconstitutional or otherwise invalid, such invalidity does not affect other provisions or applications of this Chapter which can be given effect without the invalid application or provision, and to this end each such invalid provision or invalid application of this Chapter is severable, unless otherwise provided by this Chapter. In particular, but with-

out limitation, each provision creating an exception to or an exemption or exclusion from the imposition of the tax is severable. It is hereby declared to be the legislative intent of the City Council that this Chapter would have been adopted had any such unconstitutional or otherwise invalid provision or application not been included.

SECTION 3. This ordinance shall be effective ten days after its passage and due publication but not earlier than January 1, 1984.

48 1-1-84 (Enacted)

Supreme Court, U.S.
FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN J. LYNCH and JOSEPH S. RIGHT, SR., individually and on behalf of those similarly situated,

Appellants,

vs.

CITY OF CHICAGO, a municipal corporation; HAROLD WASHINGTON, Mayor of the City of Chicago; CECIL A. PARTEE, Treasurer of the City of Chicago; and WALTER K. KNORR, Comptroller of the City of Chicago,

Appellees.

On Appeal From The Appellate Court Of Illinois

MOTION TO DISMISS OR AFFIRM

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No. 87-100

IN THE

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OCTOBER TERM, 1987

JOHN J. LYNCH and JOSEPH S. RIGHT, SR., individually and on behalf of those similarly situated,

Appellants,

VS.

CITY OF CHICAGO, a municipal corporation; HAROLD WASHINGTON, Mayor of the City of Chicago; CECIL A. PARTEE, Treasurer of the City of Chicago; and WALTER K. KNORR, Comptroller of the City of Chicago,

Appellees.

On Appeal From The Appellate Court Of Illinois

MOTION TO DISMISS OR AFFIRM

The appellees in the above-entitled case move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Appellate Court of Illinois on the ground that the questions presented are so insubstantial as not to need further argument.

ORDINANCE INVOLVED

The Chicago Boat Mooring Tax Ordinance provides in pertinent part:

> "200.8-2.A. A tax is hereby imposed upon any watercraft moored or docked for a fee in any harbor, river or other body of water within the corporate limits or jurisdiction of the City of Chicago, at a rate of 50% of such mooring or docking fee.
>
> * * *
>
> 200.8-6.B. The tax imposed herein shall not apply to any watercraft, its owner, operator or person in possession to the extent the imposition of this tax upon such would violate the Constitution of the United States or the State of Illinois.
>
> * * *
>
> 200.8-1.A. Mooring or docking fee: The term mooring or docking fee or any similar term shall mean the consideration paid for the mooring or docking or the right to the mooring or docking of any watercraft, valued in money, whether received in money or otherwise, determined without any deductions whatsoever, but not including any consideration paid for the mooring or docking of a watercraft in the loading or unloading of goods or materials, or the board or unboarding of passengers, in the conduct of a business."

The full text of the Mooring Tax Ordinance is set forth in the Appendix to the Jurisdictional Statement at A-36.

STATEMENT OF FACTS

On December 27, 1983 the City Council of Chicago passed the Chicago Boat Mooring Tax Ordinance which imposes a tax on watercraft moored or docked for a fee in any harbor, river or other body of water within the corporate limits or jurisdiction of the City of Chicago. Appellants subsequently filed a class action complaint, claiming *inter alia* that the Chicago Boat Mooring Tax: (1) violates the Commerce Clause by imposing impermissible burdens on interstate commerce, the use of navigable waters and the right to travel freely from state to state; and (2) violates the Tonnage Clause by imposing an unlawful duty of tonage. As alleged in their complaint and contrary to their Statement of Facts (Jurisdictional Statement, p. 5), appellants are all owners of pleasure boats used for "recreational purposes" (C. 2).

On May 18, 1985, the Circuit Court of Cook County granted the City of Chicago's motion to dismiss the complaint for failure to state a cause of action. On November 26, 1986, the Appellate Court of Illinois affirmed the decision of the lower court, and on April 15, 1987, the Supreme Court of Illinois denied appellants' petition for leave to appeal.

ARGUMENT

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

A. Appellants' Principal Argument That The Tax Is Unconstitutional Because No Facilities Or Services Are Conferred Upon Taxpayers For Paying The Tax Is Erroneously Based On A Standard Applicable Only To Fees.

Petitioners' contentions that the Chicago Boat Mooring Tax violates the Commerce and Tonnage Clauses are based on an erroneous premise: that the City must confer special benefits upon taxpayers as compensation for paying the tax. Appellants state that no special benefits are conferred upon taxpayers for paying the tax because the Chicago Park District, rather than the City of Chicago, provides all services and facilities to persons who moor boats in Chicago harbors; hence, they argue, the tax must fall.

To support their argument, appellants cite not a single tax case, but instead several irrelevant cases involving the imposition of fees. *Cf. Harmon v. Chicago*, 147 U.S. 396 (1893) (license fee to travel upon Chicago River); *Huse v. Glover*, 119 U.S. 543 (1886) (fee for use of locks); *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935) (harbor fees); *Evansville-Vanderburg Airport Authority v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) (charge described as "user fee" in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)).

Obviously, the critical distinction between this case and the authority relied on by appellants is that the Chicago Boat Mooring Tax is not a fee but a tax. There is no dispute that the Chicago Boat Mooring Tax is a tax upon a commercial transaction (*Lynch* appellant's brief in the Illinois appellate court, p. 11). Section 200.8-2.A of the Chi-

cago Boat Mooring Tax Ordinance provides for the imposition of a "tax" upon "any watercraft moored or docked for a fee". Section 200.8-5 requires the deposit of revenue derived from the Chicago Boat Mooring Tax into the general corporate fund of the City of Chicago.

It is well established that the validity of fees and general revenue taxes should not be tested by the same standard. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981). Although special benefits or services may be required as compensation for imposing a fee, there is no similar requirement for levying a tax. *Id.* at 621. In *Commonwealth Edison Co.*, this Court explained that the only benefit to which a taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. *Accord Korsis v. Chicago Park District*, 362 Ill. 24, 41 (1935) (municipal expenditures may properly benefit some taxpayers without benefitting others).

This principle has been consistently adhered to even when the taxed activity has a connection with interstate commerce or navigable waters. *See New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 555 (1915); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-23 (1981). The rationale for this principle is that the tax is not upon the navigation of the waters; it is upon a commercial transaction. *New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 555 (1915).

For example, in an analogous case, *New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 555 (1915), this Court upheld an excise tax upon gross corporate earnings derived from charges for towing upon navigable waters. No special facilities or benefits were provided as compensation for the tax. This Court held:

> [T]he charge is not upon the navigation of the river . . . While the State may not require a navigation license except in very exceptional cases, as for compensation for improvements which the State has made, a situation not present here, it may . . . enforce its usual and customary system of taxation without infractions of the superior authority and laws of the United States concerning the navigation of rivers.

Id. at 559-60. Thus, the Illinois appellate court's well-reasoned opinion fully comports with the established precedent of this Court. The petitioners have not, and cannot, cite any cases requiring special benefits to justify the imposition of a tax.

Moreover, appellants' argument must fail here because the City of Chicago does provide a benefit to persons subject to the Chicago Boat Mooring Tax. By statute, the City of Chicago is required to provide police protection services to the Chicago Park District. In *Chicago Park District v. City of Chicago*, 111 Ill. 2d 7, 14 (1986), a related case involving the Chicago Boat Mooring Tax, the Illinois Supreme Court held:

> [T]he city is required to (Ill. Rev. Stat. 1981, ch. 105, par. 333.7) and does provide police protection within the area of the harbors. The city is simply taxing an event that occurs within its boundaries and in an area for which it provides services.

These police services insure the safety and facility of movement of watercraft in Chicago's busy harbors.

There is clearly no merit to appellants' contention that the tax is invalid because the City provides no services or facilities. Appellants have thus failed to present a substantial federal question warranting review by this Court.

B. The Tax Does Not Violate The Commerce Clause Because It Expressly Exempts Interstate Commerce Activities And Appellants Use Their Boats Only For Recreational Purposes.

The Chicago Boat Mooring Tax does not violate the Commerce Clause for two additional reasons. First, the Chicago Boat Mooring Tax Ordinance contains a broad exclusion that encompasses all activity which might unlawfully burden interstate commerce. The ordinance exempts:

> any compensation paid for mooring or docking of a watercraft in the loading or unloading of goods or materials, or the boarding or unboarding of passengers, in the conduct of a business.

Municipal Code of the City of Chicago, sec. 200.8-1.A (1984). In addition, the ordinance expressly prohibits the imposition of the tax upon any constitutionally protected right. Municipal Code of the City of Chicago, sec. 200.8-1.A (1984). Because the Chicago Boat Mooring Tax contains an express exemption for interstate commerce activities, the tax does not violate the Commerce Clause. *New York ex rel. Cornell Steamboat Co. v. Sohmer*, 235 U.S. 555 (1915) (statute which expressly excluded earnings of an "interstate character" from the tax base did not violate the Commerce Clause).

Second, appellants allege in their complaint merely that they are owners of pleasure boats used for "recreational purposes" (C. 2). As appellants admittedly do not use their boats for commercial purposes, any claim regarding their constitutional rights in this respect should not be addressed by this Court.

C. The Tax Does Not Violate The Tonnage Clause Since It Does Not Violate The Commerce Clause.

Appellants concede, as they must, that duties of tonnage are not unlawful unless they impermissibly burden inter-

state commerce. (Jurisdictional Statement, p. 11) *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935). The Tonnage Clause was designed to prevent the indirect taxation of imports and exports by imposing a tax upon commercial vessels entering and leaving ports. In *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 264 (1935), this Court stated:

> It seems clear that the prohibition against the imposition of any duty of tonnage was due to the desire of the Framers to supplement Art. I, §10, Clause 2, denying to the states power to lay duties on imports or exports. See *Steamship Co. v. Portwardens*, 6 Wall, 31, 35; *Packet Co. v. Keokuk*, 95 U.S. 80, 87, 88, by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state, and to their doubts whether the commerce clause would accomplish that purpose. If the states had been left free to tax the privilege of access by vessels to their harbors, the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.

Likewise, in *Packet Co. v. Keokuk*, 95 U.S. 80, 85 (1877), this Court held:

> What was intended by the [Tonnage Clause] was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent. A mere adherence to the letter, without reference to the spirit and purpose may in this case mislead, as it has misled in other cases.

Accord, *Huse v. Glover*, 119 U.S. 543 (1886); *Inman Steamship Co. v. Tinker*, 94 U.S. 238 (1876).

In this case, the Chicago Boat Mooring Tax cannot be used as an indirect method of imposing an import or export tax upon the cargo of a vessel since Section 200.8-1.A expressly excludes from the tax base "any consideration paid for the mooring or docking of a watercraft in the loading or unloading of goods or materials, or the board-

ing or unboarding of passengers, in the conduct of a business."

Because the Chicago Boat Mooring Tax does not interfere with local trade, it does not infringe upon the Tonnage Clause, the constitutional safeguard against the indirect taxation of imports and exports. Thus, the Illinois appellate court's decision is firmly aligned with long-established precedent of this Court and does not present a substantial federal question warranting further review.

D. The Tax Does Not Restrict Travel Upon Navigable Waters Or Between The States.

Appellants mischaracterize the Illinois appellate court's decision as having held "that restricting access to mooring and docking facilities which adjoin a navigable waterway, by use of a Mooring Tax, does not restrict the use of such waterway or impede the flow of interstate commerce" (Jurisdictional Statement, pp. 9-10). The appellate court never said that the tax restricts access to mooring and docking facilities. To the contrary, the appellate court emphasized that the tax is on "a commercial transaction within the city, not upon the navigation of waters" (Opinion, p. 6). Because the tax is imposed only on the commercial transaction of renting a mooring facility, the tax neither restricts the use of the waterways nor impedes the free flow of interstate commerce.

The sole support offered by appellants for their contention that the tax does restrict the use of navigable waters is their statement that in "order to use navigable waters, one must also be able to use the adjoining mooring and docking facilities"[1] (Jurisdictional Statement, p.

[1] Appellants did not present this argument to the Illinois Appellate Court.

10). This statement simply is not true. The Chicago Boat Mooring Tax imposes no restraint upon movement on navigable waters because the tax is levied only on persons who choose to use the docking and mooring facilities provided by the Chicago Park District for their convenience (C. 83). Boat owners who purchase their own facilities or use ramp launchings or land storage facilities are not subject to the tax (C. 83).

Moreover, the failure to pay the Chicago Boat Mooring Tax will not prevent any boat owner from traveling in the mooring areas or on other waterways. The Chicago Boat Mooring Tax Ordinance does not require the Chicago Park District to refuse to issue a permit to use its facilities or to revoke an existing permit if a person refuses to pay the tax. The City of Chicago has no authority to impound boats or impede their movement in any way. Indeed, the sole method of enforcement available to the City under Section 200.8-2.B of the ordinance is to file a lawsuit to collect taxes due and owing. Consequently, the Chicago Boat Mooring Tax imposes no restrictions upon the freedom to navigate waterways.

Nor does the Chicago Boat Mooring Tax impermissibly restrict a citizen's right to travel freely from state to state as appellants contend. Their only support for that contention is *Evansville-Vanderburg Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 713-14 (1972), a case involving an unconstitutional "user fee" imposed upon all persons emplaning any commercial airline. *Evansville-Vanderburg*, however, is irrelevant to this case not only because, like so many of the other cases appellants cite, it involved a fee rather than a general revenue tax, but also because in this case persons may board or debark from boats in the Chicago harbors and leave or enter the City without charge.

In sum, each of appellants' theories falls short because the tax is nothing more than a general revenue-raising tax on a commercial transaction. As such, it is constitutional in all respects. Because the Illinois appellate court's well-reasoned opinion follows the settled precedent of this Court, no conflict exists between the decision sought to be reviewed and a decision of this Court. Therefore, this case presents no substantial federal question warranting review by this Court.

CONCLUSION

For the foregoing reasons, appellees submit that the questions upon which this case depends are so insubstantial as to require no further argument, and appellees respectfully move this Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Appellate Court of Illinois.

Respectfully submitted,

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